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THE PRESIDENT'S PREROGATIVE IN GRANTING CLEMENCY TO NARCOTICS PRISONERS FROM THE PERSPECTIVE OF MAQASYIDUL SYARIAH

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Abstract

The phenomenon of granting clemency to narcotics prisoners in Indonesia, as part of the president's prerogative, raises tensions between legal certainty and humanitarian considerations. This research aims to analyze the mechanism and legitimacy of granting clemency through the ethical perspective of Islamic law, especially *maqāṣid al-syarī' ah*. By using normative legal research procedures through legislative, conceptual, and problem analysis approaches, this research examines primary and secondary legal materials. The main findings say that *maqāṣid al-Syarī'ah* provides a comprehensive evaluation framework, in which clemency can be morally justified if it is oriented towards the protection of the soul (*ḥifẓ al-nafs*), the restoration of ideas (*ḥẓ al-aql*) via rehabilitation, and restorative justice. However, research concludes that this prerogative should not ignore the public interest (*maslaḥah 'āmmah*) as the highest consideration. The implication is that the clemency policy requires extreme prudence to avoid weakening law enforcement and justify balancing the justice of people and the protection of citizens from the dangers of narcotics.

Keywords: Clemency, Maqasyid syariah, Drug Prisoners, Right of prerogatif

Abstrak

Fenomena pemberian grasi kepada narapidana narkoba di Indonesia, selaku bagian dari hak prerogatif presiden, memunculkan ketegangan antara Kepastian hukum serta pertimbangan kemanusiaan. Riset ini bertujuan untuk menganalisis mekanisme dan legitimasi pemberian grasi tersebut lewat Perspektif etika hukum Islam, khususnya *maqāṣid al-syarī' ah*. Dengan memakai tata cara riset hukum normatif lewat pendekatan perundang-Undangan, konseptual, serta analisis permasalahan, riset ini mengkaji bahan Hukum primer serta sekunder. Penemuan utama mengatakan kalau *maqāṣid al-Syarī'ah* sediakan kerangka evaluasi yang komprehensif, di mana grasi bisa Dibenarkan secara moral bila berorientasi pada proteksi jiwa (*ḥifẓ al-nafs*), Pemulihan ide (*ḥifẓ al-aql*) via rehabilitasi, serta keadilan restoratif. Tetapi, riset Merumuskan kalau hak prerogatif ini tidak boleh mengabaikan kemaslahatan Publik (*maslaḥah 'āmmah*) selaku pertimbangan paling tinggi. Implikasinya, Kebijakan grasi membutuhkan kehati-hatian ekstrem untuk menghindari Melemahnya penegakan hukum serta membenarkan penyeimbang antara Keadilan orang serta proteksi warga dari bahaya narkoba.

Kata kunci: Grasi, Maqasyid syariah, Narapidana Narkoba, Hak prerogatif

INTRODUCTION

The phenomenon of granting clemency to narcotics inmates is a legal and moral issue that continues to reap debate in Indonesia. The President plays a crucial role in government administration, because he performs his functions as the head of state as well as the head of government simultaneously, where both roles are intrinsically integrated in his position (Rannie, 2020). The President's prerogative generally includes the granting of four types of policies, namely clemency, amnesty, abolition, and rehabilitation, as stipulated in Article 14 of the 1945 Constitution (Kaharudin, 2016). However, sometimes problems arise due to the power of authority that the President has in exercising this prerogative, so that efforts to limit it are carried out (Chaerul, 2017). As a country of law with a presidential system, the President holds the prerogative as guaranteed in Article 14 of the Constitution of the Republic of Indonesia in 1945, to grant clemency, amnesty, abolition, and rehabilitation by taking into account the considerations of judicial institutions such as the Supreme Court (MA). However, the implementation of this prerogative often raises polemics when dealing with the problem of extraordinary crimes such as narcotics, which as a result extends to the moral, social, and generational resilience of the nation (Mene, 2022). It is important to explore how the clemency process can affect public perceptions of justice and law enforcement, especially in the context of narcotics crimes in Indonesia.

Sourced from information from the National Narcotics Agency (BNN) in 2024, the number of narcotics abuse in Indonesia will reach 4.8 million people, an increase of nearly 13% compared to 2022. More than 38% of the inmates of the correctional institution are inmates with narcotics problems. This situation shows that narcotics crimes have become a multidimensional threat to *ḥifẓ al-nafs* (protection of the soul), *ḥifẓ al-'aql* (protection of reason), and *ḥifẓ al-nasl* (protection of offspring) three of the 5 main objectives in *maqāṣid al-syarī'ah*. Therefore, when the President uses the prerogative to grant clemency to narcotics inmates, the decision has not only legal, but also ethical, social, and religious consequences (Puluhulawa, 2024). The decision creates a challenge in balancing the human rights of convicts and the interests of the community in combating destructive narcotics crimes. The process of granting clemency must consider the social and psychological impact on society, as well as its effectiveness in preventing future narcotics crimes (Puluhulawa, 2024).

In practice, granting clemency to narcotics offenders reflects a change in the political and legal approach of each government. During the time of President Susilo Bambang Yudhoyono, some narcotics convicts such as Schapelle Leigh Corby received clemency in the form of a 5-year reduction in sentence. Meanwhile, President Jokowi Dodo expressly reported that he did not want to distribute clemency to convicts of narcotics problems, with the alibi that drugs had "disturbed the nation's generation" and "did not deserve forgiveness". However, this policy then became a debate when in 2023 President Jokowi distributed clemency to Merri Utami, a person sentenced to death for narcotics problems, with humanitarian alibi and consideration of a change in attitude.

This policy comparison has given rise to academic debates among legal experts and scholars. The pro gratia group commented that the president's prerogative is a

humanitarian instrument, which is a humanitarian facility to correct legal inequities that may be intertwined in the judicial process. A thorough comparison of these various policies, in turn, gives rise to a broad and interesting academic debate among legal experts, legal experts, and scholarly individuals who are deeply invested in the implications of these policies. Pro-clemency advocacy groups have earnestly commented that the president's prerogative should be viewed as a vital humanitarian instrument, serving as an essential humanitarian facility specifically designed to remedy and remedy legal inequalities that may be entangled in the complexities of the judicial process (Barkow & Osler, 2024).

For Jimly Asshiddiqie, the prerogative is not absolute power, but a form of discretionary justice that is always subject to the principle of substantive justice and the principle of benefit. In the context of Islam, this matter is in line with the principle of *maqāṣid al-syarī'ah*, where the actions of rulers (imams) aimed at protecting the interests of the ummah are legal according to *sharī'i*. On the contrary, the contra group commented that granting clemency to narcotics perpetrators has the potential to weaken law enforcement and hurt the public's sense of justice. For Mahfud MD, the prerogative must be exercised carefully because it has a solid political measure and can disturb the country's credibility in the war on narcotics. From the point of view of *maqāṣid al-sharī'ah*, clemency given without consideration of public benefits can even be contrary to the purpose of sharia to protect human souls and ideas (Kamalludin & Arief, 2018).

Through the perspective of *maqāṣid al-syarī'ah*, this research seeks to balance these 2 poles of thought. The granting of clemency is not just an administrative action, but a moral test for the state to uphold justice by thinking about *maslaḥah mursalah* (universal benefits that are not explicitly stated in the text) (Santoso, 2020). Within this framework, the *maqāṣid* serves as a tool for ethical assessment of presidential decisions, taking into account whether the prerogative actually brings public benefits (*jalb al-maṣlaḥah*) and avoids destruction (*dar' al-mafسادah*). Several previous researches have explored this issue from the perspective of positive law or *fiqh siyasah*. Permatasari (2013) highlighting the implementation of clemency in drug problems from the normative aspect of national law, but has not yet linked it to the principle of *maqāṣid*. Azizah & Rohmah (2022) Examining clemency from the perspective of *fiqh siyasah*, but the discussion focuses more on the validity of the law, not on the framework of *maqāṣid* and social benefits. Rizki (2025) While trying to combine political, legal, and humanitarian aspects, it has not explored the theological moral aspects of *maqāṣid syarī'ah* in depth.

From these studies, it appears that there is a research gap that there is no comprehensive analysis that combines *maqāṣid al-syarī'ah* with the presidential prerogative in the context of clemency for narcotics prisoners. Meanwhile, the *maqāṣid* approach can provide a philosophical framework to take into account the moral and social legitimacy of clemency policies in the midst of a growing crisis of public confidence in executive institutions. Therefore, this research is intended to share theoretical and practical contributions to the development of constitutional law and Islamic law in Indonesia. Theoretically, this research seeks to expand the description that *maqāṣid al-syarī'ah* can be an ethical instrument in the evaluation of public policy. Instantly, the results of this research are

expected to be a policy reference for the government in upholding restorative justice and humanity without neglecting the protection of citizens from the dangers of narcotics. Thus, the research entitled *Maqāṣid al-Syarī'ah in the President's Prerogative to Grant Clemency for Narcotics Prisoners* is relevant and compelling to try. This research not only discusses the validity of the law, but also returns the president's prerogative to the corridor of sharia ethics and the benefit of the nation so that the law is not only on the side of official certainty, but also on substantive justice and general humanitarian values.

METHODS

This study uses a juridical-normative approach with a qualitative-descriptive method to examine the President's prerogative in granting clemency to narcotics prisoners through the perspective of *maqāṣid al-syarī'ah*. The nature of this research is descriptive-analytical, which aims to describe and systematically analyze the application of clemency in Indonesia and its conformity with the principles of *maqāṣid al-syarī'ah*, such as *ḥifẓ al-nafs*, *ḥifẓ al-'aql*, and *ḥifẓ al-nasl*. This type of research is normative legal research (library research) that relies on primary, secondary, and tertiary legal materials, without field observation or interviews, to examine positive legal norms and concepts of Islamic law within the framework of *siyasah syar'iyah*.

The legal approach applied includes a statute approach to analyze regulations such as the 1945 Constitution Article 14, Law No. 5 of 2010 concerning Clemency, and Regulation of the Minister of Law and Human Rights No. 49 of 2016; conceptual approach to examine the concepts of prerogative, clemency, and *maqāṣid al-syarī'ah*; historical approach to trace the history of clemency in Indonesia and its comparison with classical Islamic applications; and case approaches to analyze concrete cases such as Schapelle Leigh Corby and Merri Utami. Primary data sources include laws and presidential decrees related to clemency, while secondary sources include scientific literature from authors such as Hasim Hartono, Amelia Riska Permatasari, and Jihadini Nur Azizah, and works by Al-Ghazali and Quraish Shihab; tertiary materials such as legal dictionaries and formal websites of BNN and the Supreme Court.

The information analysis method uses normative qualitative analysis through content analysis to examine the normative content of Islamic regulations and doctrines, comparative analysis to equate the application of clemency with *siyasah syar'iyah*, and deductive-inductive analysis to draw universal conclusions sourced from *maqāṣid* and apply it to clemency policies. Through this approach, the research creates a comprehensive description of the synchronization of positive law and *maqāṣid al-syarī'ah*, and shares ethical underpinnings for the use of the President's prerogative to justify justice, humanity, and the public benefit.

RESULTS AND DISCUSSION

A. The Essence of the President's Prerogative in Granting Clemency to Drug Convicts

The essence of granting clemency to drug convicts is basically a manifestation of the President's prerogative mandated by Article 14 paragraph (1) of the 1945 Constitution,

which is then regulated in more detail in Law No. 22 of 2002 concerning Clemency as amended by Law No. 5 of 2010. Clemency is interpreted as a form of pardon given by the Head of State in the form of changes, modifications, reductions, or abolitions of criminal execution against convicts who already have a court decision with permanent legal force, including in drug cases that are often sentenced to severe punishment such as the death penalty or life imprisonment (Puluhulawa, 2024). The granting of clemency does not abolish the guilt of the convict, but rather as a correction to the execution of punishment that is considered no longer in accordance with considerations of justice, humanity, or the development of the situation (Lumban Tobing, 2023).

In the context of drugs, granting clemency poses a dilemma between firm law enforcement and humanitarian considerations. On the one hand, drugs are categorized as extraordinary crimes that threaten the younger generation and the social order, so many parties argue that granting clemency can weaken the deterrent effect and reduce the credibility of law enforcement. On the other hand, clemency can be seen as a rehabilitative instrument that takes into account changes in the convict's behavior, health conditions, or other humanitarian factors that are not accommodated in the judicial process. For example, in the case of Meirika Franola, clemency was granted after she showed good behavior during her sentence, despite sparking controversy (Lumban Tobing, 2023). Therefore, the essence of clemency in drug cases is not only legal, but also social and political, which requires a balance between the interests of retributive justice, the utility of crime prevention, and human values.

To ensure that clemency is properly functioned, there needs to be transparent and strict criteria accompanied by a supervisory mechanism in granting clemency. Some experts have suggested that consideration should not be solely up to the president, but should also involve a comprehensive evaluation of independent institutions such as the Supreme Court, followed by a structured rehabilitation program to prevent recidivism. In such a way, the essence of granting clemency to drug convicts makes it not only a form of pardon but also a holistic part of a penal system, whose orientation upholds a sense of justice, legal certainty and protection of society.

B. Mechanism of the President's Prerogative in Granting Clemency to Drug Prisoners

The President's prerogative in granting clemency is a constitutional power mandated by Article 14 Paragraph (1) of the 1945 Constitution, which states: "The President shall grant clemency and rehabilitation by carefully considering the considerations of the Supreme Court." In the context of drug inmates, the mechanism for granting clemency is further regulated in Law No. 22 of 2002 concerning Clemency and Law No. 5 of 2010 concerning the Replacement of Law No. 22 of 2002 (Cayo, 2017). The mechanism can be described as follows: Submission of Application: An application for clemency is submitted in writing by the convict, his family, or legal representative to the President through the Minister of Law and Human Rights (Menkumham). This application must be accompanied by solid reasons, such as a legal alibi (doubt about the verdict), a social alibi (old age, serious illness), or an alibi of moral and humanitarian character.

Administrative Process at the Ministry of Law and Human Rights: After the application is received, the Ministry of Law and Human Rights carries out administrative and substantive verification. The Ministry of Law and Human Rights can request a report from a correctional institution (prison) on the behavior and attitude of inmates throughout their sentence. In drug problems, aspects such as the level of involvement (whether as a dealer or user), rehabilitation efforts that have been undertaken, and recidivism skills are important considerations. Supreme Court (MA) Considerations: The President thereafter requested formal consideration from the Supreme Court. The Supreme Court wants to review the judicial process that has been undertaken, think about justice in the verdict, and take into account the reasons put forward by the applicant. The Supreme Court's consideration must be considered (mandatory) by the President, even though the absolute final decision rests with the President. This means that the President must not ignore the Supreme Court's considerations without an alibi that can be legally accounted for.

President's Decision: After receiving the Supreme Court's consideration, the President makes a decision. This decision is final and binding, and is the embodiment of prerogative. The President can grant, refuse, or grant some of them (for example, changing the death penalty to life, or life to 20 years). There is no appeal or other legal remedies against the President's decision to grant clemency. In the context of drugs, granting clemency often gives rise to sharp pros and cons. On the one hand, clemency can be given to actors who are considered by Cuma as "victims" (users) who have shown a change in attitude. On the other hand, clemency to drug dealers or producers is considered to interfere with drug eradication efforts and ignore the widespread consequences of drug crimes against the younger generation.

C. Maqasid Syariah on the Mechanism for Granting Clemmons for Drug Prisoners

The aspect of benefit can only be realized if the five main elements can be realized, namely religion, soul, heredity, intellect and property. Therefore, the categorization of the benefits of the world and the hereafter shows that the character of Islamic law rules has noble ideals because it makes spiritual elements the most important part of its materials. In addition, pay attention to moral maintenance, so that moral and ethical violators will receive legal sanctions (Darma et al., 2023). Islam in principle encourages forgiveness in various aspects of life, both directly related to civil and criminal matters, and includes individual rights and the rights of Allah SWT, as long as the case has not gone through the legal process. However, the granting of such forgiveness must not sacrifice a sense of justice (Suryadi, 2018).

There is also the duty of a caliph or leader to lead Muslims in worldly and religious matters to replace the Prophet Muhammad PBUH in order to uphold religious values and maintain everything that must be carried out by Muslims (Iqbal, 2014). On the other hand, for Ibn Khaldun, the Caliph or leader has the task of realizing the benefits of double measure, namely the benefits in this world and the benefits in the hereafter as well as the expertise to prevent the ummah from destruction (Hidayat, 2013).

This is in accordance with the rules of fiqh which reads: "The policy actions of the imam (head of state) over his people must be in accordance with the Benefit (Iqbal, 2014).

The maqasid sharia, which is the general purpose of Islamic sharia, provides a deep philosophical framework for evaluating public policy, including clemency. Maqasid aims to realize benefits (maslahah) and reject destruction (mafsadah) for humans. The core concept of maqasid formulated by Imam Al-Ghazali and Ash-Syatibi includes the protection of five main things (al-dharuriyyat al-khams): religion (din), soul (nafs), intellect (aql), generation (nasl), and property (mal). With this perspective, the mechanism of clemency can be analyzed as follows. The relevance of Clemency with the Protection of the Soul (Hifz al-Nafs) in Islamic law strongly upholds the value of life. The principle of "la darar wa la dirar" (not to harm oneself and others) is an important foundation. In the context of clemency, this principle can be used as a basis for considering clemency for drug inmates whose conditions are life-threatening. Clemency on the basis of severe illness, if a drug inmate suffers from severe illness that is impossible to recover in prison, leaving him in prison can be viewed as a neglect of life. Granting clemency for the sake of health care is a manifestation of hifz al-nafs. This is in line with the spirit of Islam which facilitates and provides relief (rukhsah) in an emergency, as stated by Allah SWT in QS. Al-Baqarah: 173 which shows the principle that in forced conditions (dharurat), the law can be relaxed to protect the soul. Severe illness that threatens life in prison can be categorized as an emergency condition that requires humanitarian solutions, one of which is through clemency. Clemency as a form of mercy (affection) is also in line with Islam as a religion of mercy, based on the hadith of the Prophet Muhammad PBUH about establishing goodness (ihsan) in everything. The spirit of doing good in this hadith can be interpreted as humane treatment, including to prisoners. Clemency, especially for prisoners who are old, sick, or show serious remorse, can be seen as a manifestation of the value of mercy and ihsan in a strict legal system, which does not weaken the law, but fulfills the law with a humanitarian dimension.

The relevance of Clemency with the Protection of Reason (Hifz al-Aql) considering that drug crimes directly interfere with al-aql (reason), which is the greatest gift of Allah. Therefore, punishment for drug offenders must be preventive and curative. Clemency that is oriented to rehabilitation, where the clemency mechanism can be associated with the rehabilitation program, is important because an addicted drug user is a person whose mind is damaged. Imprisoning him without rehabilitation may not solve the root of the problem. Clemency can be granted with strict conditions that the convict must undergo and complete the rehabilitation program completely. This approach is more in line with hifz al-aql because it aims to restore the perpetrator's intellectual function, so that he can return to being a productive member of society, which is a form of greater benefit (maslahah jalb) than just imprisoning him which has the potential to worsen his condition. Clemency and Restorative Justice (Al-Adl) are also important because sharia maqasid is not only about retributive justice (retribution), but also restorative justice (restoration). If substantive injustice is found in the judicial process, such as doubtful evidence or legally defective procedures, clemency can be a corrective tool to realize true justice, as

commanded by Allah SWT in QS. Al-Maidah: 8 to be fair. Clemency, which is considered by the Supreme Court, can be a channel to correct mistakes that may occur, so that justice that is at the core of Islamic sharia (al-adl) is truly upheld. Furthermore, Clemency and Generational Protection (Hifz al-Nasl) considering that a drug addict is often the backbone of the family. Long imprisonment without hope can destroy the economic and psychological structure of families, especially children. Granting clemency to inmates who have shown change and have family responsibilities, under close supervision, can protect their families from deeper destruction. This action protects hifz al-nasl by safeguarding the survival and well-being of innocent children.

However, the Counter Analysis: Between Prerogative Rights and the Potential of Mafsadah (Destruction) must also be watched out. Although it has a solid philosophical foundation in sharia maqasid, granting clemency to drug inmates also has great potential for mafsadah (destruction). Harassment of the Principles of Justice (Al-Adl) and Legal Certainty can occur because the prerogative which is highly subjective and final has the potential to cause injustice. Two inmates with the same case and behavior can get different clemency decisions, depending on the President's subjective point of view. This is contrary to the principle of legal certainty, which is also part of the sharia maqasid. The law must be consistently enforced to produce a deterrent effect (zawajir). Clemency that is given loosely, especially to drug dealers, can be perceived as a form of "pardon for the powerful" or a political commodity, thus disrupting the authority of the law and causing public distrust of the judicial system. Ignoring Maqasid Hifz al-Nafs and Hifz al-Aql on the Macro Scale is also a risk, because clemency for a prisoner may be a form of hifz al-nafs and mercy for him. However, if the clemency makes him return to being a dealer (recidivist), then the action has actually risked hifz al-nafs and hifz al-aql from hundreds or even thousands of potential drug victims in the community. Here there is a conflict between the individual benefit (maslahat al-fard) and the public benefit (maslahat al-amm). In the rule of jurisprudence, the public benefit must take precedence: "Rejecting greater destruction should take precedence over attracting smaller benefits" (daru al-mafasid muqaddamun ala jalb al-mashalih). The imprudent granting of clemency can be a much greater mafsadah for the community. Harassment of victims and victims' families is also worth considering, considering that drug crimes not only harm the perpetrators themselves, but also destroy the lives of victims and their families. The clemency given to the perpetrator can be considered to underestimate the suffering of the victims and their families. In the perspective of maqasid, this can be contrary to hifz al-nafs and hifz al-mal victims. Justice for victims and families must be the main consideration that is no less important than humanitarian considerations for the perpetrators. The potential to generate disincentives for law enforcement also exists, because the hard efforts of law enforcement officials in eradicating drugs can be in vain if severe inmates are then released or pardoned through clemency. This can weaken the spirit and usefulness of drug eradication, which ultimately interferes with the main purpose of the sharia to protect the community (hifz al-ummah).

The mechanism for granting clemency to drug convicts, although it is the constitutional right of the President, is a legal instrument loaded with philosophical measures. From the

perspective of maqasid sharia, clemency can be justified and even more encouraged if it plays a role in: Protecting the life (hifz al-nafs) of prisoners from the threat of death in prison, Restoring ideas (hifz al-aql) through rehabilitation programs that are the provisions of clemency, Upholding restorative justice (al-adl) when injustice is established in the judicial process, and Protecting the generation (hifz al-nasl) of innocent prisoners. But this prerogative is not an absolute power without limitations. He must be managed with great care and wisdom so that he does not turn into a new source of mafsadah. The main principle that must be held is that the public interest (maslahat al-amm) must be the highest consideration.

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"The broader public interest must take precedence over the special interest (certain groups or groups) (Iqbal, 2014)".

Clemency should not be granted if it causes greater destruction to citizens, such as weakening drug eradication, hurting a sense of justice, or endangering universal security. Therefore, the position of the Supreme Court's considerations is crucial as a controller and balance the President's subjectivity. Thus, the mechanism of clemency can be an instrument that is not only constitutional, but also moral and in line with the noble goals of Islamic sharia (maqasid al-sharia) to realize true benefits for all nations.

CONCLUSION

Based on this research, it can be concluded that the mechanism for granting clemency to narcotics inmates is a manifestation of the President's prerogative as stipulated in the constitution. The main findings of the research show that the perspective of maqāsid al-syarī'ah provides a comprehensive ethical framework for evaluating this clemency policy. Clemency can be morally justified when it is oriented towards the protection of the soul (ḥifẓ al-nafs), the restoration of ideas (ḥifẓ al-'aql) through rehabilitation, the enforcement of restorative justice, and the protection of the generation (ḥifẓ al-nasl) of the convict. However, this prerogative is not absolute power and it is obligatory to always consider the public interest (maslahah 'āmmah) as the highest consideration to avoid greater mafsadah (destruction), such as weakening law enforcement and citizens' sense of justice.

Theoretically, this research contributes by expanding the application of maqāsid al-syarī'ah as an ethical instrument in analyzing public policy outside the domain of traditional Islamic law, especially in constitutional law. Instantly, the results of this research are expected to be a consideration for the President in using his prerogative to strike a balance between human values and substantive justice. The limitation of this research lies in its normative approach that has not tested citizens' assumptions empirically. Therefore, further research is recommended to increase empirical research to measure the socio-psychological effects of clemency on public confidence in law enforcement.

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